No. 89-384 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP J. BROWN, *et al.*,
Petitioners,

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents 1250 Twenty-Fourth Street Associates Limited Partnership and J. W. Kaempfer, Jr., its general partner (hereafter "Associates"), respectfully pray that the Court deny the Petition for Writ of Certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on June 9, 1989.

STATEMENT OF THE CASE

Petitioner Philip J. Brown [1] seeks review of a decision by the Court of Appeals refusing to vacate an order of the Court entered a year earlier. Mr. Brown's allegations that the Circuit Chief Judge had a "conflict of interest" requiring her recusal were rejected by the Court as factually unfounded and totally frivolous.

Mr. Brown, along with William J. Brown and B&W Management, Inc. (collectively "the Browns") are debtors in pending Chapter 11 bankruptcy cases in the United States Bankruptcy Court for the District of Columbia (Nos. 81-00698, 81-00700, 81-00701). Following a court-appointed examiner's report, a Trustee was appointed for the three bankruptcy estates in July 1982.

On November 8, 1983, the Trustee filed an amended plan of arrangement. The centerpiece of this plan was a 99-year ground lease of property located at 1250 24th Street, N.W., Washington, D.C. (the "Ground Lease") between The Kaempfer Company (Associates' predecessor in interest), as lessee and the Browns as landlord. On December 23, 1983, the parties executed a first amendment to the Ground Lease (the "First Amendment") which provided that the tenant could seek a favorable rezoning of the leased property and, if successful, would be partially reimbursed for its costs by the landlord.

On January 10, 1984, the Bankruptcy Court confirmed the Trustee's amended plan of arrangement and directed the Trustee to execute on behalf of the bankruptcy estates the Ground Lease as amended by the First Amendment.

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[1] Mr. Brown filed the Petition for Writ of Certiorari as a *pro se* litigant. William J. Brown, who is allied with Mr. Brown and who was party to the proceedings below, is sometimes identified in Mr. Brown's Petition as a petitioner. However, William Brown has not signed the Petition as a *pro se* litigant and has not appeared through counsel. Respondents therefore assume that William Brown is not a petitioner in this proceeding.

The Browns appealed the Bankruptcy Court order, but the order was affirmed by the District Court in July 1984.

Disputes arose between the Browns and Associates in January 1986. The Browns served on Associates default notices under the Ground Lease and disputed the calculation of ground rent under the formulas set forth in the Ground Lease and the First Amendment. Associates filed an adversary proceeding seeking a declaration that the two default notices were invalid, a declaration that the rent formulas of the Ground Lease and First Amendment governed the calculation of rent, and an injunction to prohibit the Browns from issuing any future default notices without prior determination from the Court that the proposed default notice is filed in good faith and is not frivolous. The Browns filed an eight-count counterclaim alleging, *inter alia*, that the rent formulas in the Ground Lease and the First Amendment should be set aside on grounds of fraud.

On May 13, 1986, District Court Judge John H. Pratt issued a Memorandum Opinion granting Associates its requested relief and denying and dismissing each of the Browns' claims. Judge Pratt held that the rent formulas in the Ground Lease and the First Amendment were unambiguous and could not be set aside on the grounds of fraud because (i) such allegations were time-barred under 11 U.S.C. § 1144, and (ii) the allegations were insufficient as a matter of law since the Browns had a duty to read the documents, and the Browns had executed the documents.

The Browns appealed that portion of the District Court's order relating to the validity of the Ground Lease and First Amendment. On December 15, 1986, the Court of Appeals summarily affirmed the District Court (D.C. Cir. No. 86-7007).

On or about January 14, 1987, the Browns filed a petition for reconsideration in the Court of Appeals. For the

first time in these proceedings, the Browns alleged that one of the signatures of Philip J. Brown on the First Amendment was a forgery. Significantly, the alleged forgery was a signature witnessed by Nicholas A. Addams, Esq., the Browns' attorney. On February 17, 1987, the D.C. Circuit denied the petition for reconsideration without prejudice to the Browns' right to file a motion for relief from judgment pursuant to Rule 60(b).

Three months later, on May 12, 1987, the Browns filed a Rule 60(b) motion with the District Court. Following full briefing, the District Court denied the motion in a Memorandum Order filed November 18, 1987. The District Court held that the allegations of forgery were irrelevant as a legal matter since the authenticity of Philip J. Brown's signature had no bearing on the validity and enforceability of the First Amendment, since the Trustee, who had the sole authority to execute the documents on behalf of the bankruptcy estates, knowingly ratified the First Amendment. The District Court further held that the Rule 60(b) motion must be denied because the Browns failed to demonstrate why they could not have discovered the evidence before judgment. The District Court also found that the Browns' unexplained failure to pursue the alleged forgery issue immediately after the District Court's May 13, 1986 opinion was "a virtual admission of their lack of due diligence." As an alternatively sufficient ground to deny the Rule 60(b) motion, the District Court found that the Browns failed to file the motion within a reasonable time, even assuming that their late discovery of the "forgery" was excusable.

On June 28, 1988, the Court of Appeals (Wald, C. J., Mikva and Edwards, JJ.) granted Associates' motion for summary affirmance of the November 18, 1987 order (D.C. Cir. No. 88-7020). The Browns filed a petition for writ of *certiorari* on September 26, 1988. The Court denied the petition on November 14, 1988. *Brown v. 1250*

Twenty-Fourth Street Associates Limited Partnership, —— U.S. ——, 109 S.Ct. 393 (1988).[2]

Four months after this Court denied *certiorari*, the Browns filed with the Court of Appeals a motion to recall mandate and a motion to vacate the June 28, 1988 order summarily affirming the District Court. The Browns alleged: "Just recently, the Appellants discovered that Chief Judge Wald's husband, Robert Wald, was, in what tends to show, involved in a business transaction with the counsel for the Appellants' bankruptcy trustee." The Browns alleged that the "conflict of interest" mandated vacating the summary affirmance order.

The Browns' central allegation was that Mr. Wald had purchased an interest in a limited partnership in December 1985 and that Mr. John H. Naisbitt had withdrawn from the same limited partnership in December 1985. Mr. Naisbitt was represented in the transaction by Peter R. Kolker, Esq., as attorney-in-fact. Mr. Kolker serves as counsel to the Browns' bankruptcy Trustee. The Browns concluded: "It appears Mr. Wald brought [*sic*] Mr. Naisbitt's interest through Kolker."

On April 5, 1989, the Court of Appeals denied the motions to recall and vacate the summary affirmance order, writing, in part:

> Almost eight months after this appeal has been decided, appellants attempt to reopen their case by raising a totally frivolous allegation of "appearance of impropriety" on the part of a member of the panel. Appellants' argument concerning the alleged conflict of interest is irresponsible. In view of the abusive nature of these filings and in view of appellants' frequent use of this tactic, further inquiry is appropriate.

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[2] Petitioner's Statement of the Case made no reference to the fact that this Court denied *certiorari* in his initial appeal from the Court of Appeals decision on the merits of the Rule 60(b) claim.

The Court directed the conduct of the Browns' counsel to the appropriate disciplinary authorities. (Appendix 1a-2a).

Attached to the Court's April 5, 1989 Order was a Statement of Chief Judge Wald.[3] (Appendix 3a-5a). In the Statement, Chief Judge Wald explained, in part:

> The motions and voluminous supporting papers are replete with untruths, misrepresentations, inaccuracies, and irrelevancies. I address myself only to the central allegations of the motions.
>
> My husband has never had business dealings with Mr. Kolker or Mr. Naisbitt directly or indirectly, did not directly or indirectly purchase Mr. Naisbitt's interest in a real estate limited partnership, or any part of it through Mr. Kolker, and did not then know, and did not learn until the filing of these motions, of any involvement or participation of Mr. Naisbitt or Mr. Kolker in the real estate partnership.
>
> . . . .
>
> I could not have known of a sale through Mr. Kolker of his client's interest in the partnership to my husband, nor of a purchase through Mr. Kolker by my husband of Mr. Kolker's client's interest, since no such sale or purchase ever occurred. They are a total fiction.

Undaunted, the Browns filed with the full Court of Appeals a suggestion for *en banc* consideration of their motion to vacate the summary affirmance order. On June 9, 1989, the full Court denied the suggestion and, on its own motion, referred the suggestion for *en banc* consideration to the disciplinary authorities to be considered in the proceedings initiated by the Court's order of April 5, 1989. (Appendix 6a-7a).

Philip Brown filed a Petition for Writ of Certiorari on or about September 7, 1989.

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[3] Mr. Brown did not include this attached Statement in the appendix to his Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals acted well within its authority and its discretion in refusing to reopen a long-settled matter when the Browns alleged that there was a "conflict of interest" which was factually untrue. Moreover, the Court did not deny Mr. Brown any due process rights in referring his attorney to disciplinary authorities in view of the Browns' repeated use of the recusal "tactic" in litigation and in the face of allegations which were "irresponsible," "totally frivolous," and "abusive." Mr. Brown does not have a due process right to concoct fictitious "conflicts of interest."

REASONS FOR DENYING THE WRIT

The Court of Appeals Properly Refused to Vacate Its June 1988 Order When the Petitioner Presented Only Insufficient and Unsupported Allegations of "Conflict of Interest."

The Petition seeks review of a decision by the Court of Appeals refusing to reopen a matter it had passed on nearly a year before. It is not a denial of any legitimate rights of Mr. Brown when the Court of Appeals declines to vacate the decision of a three-judge panel after denial of *certiorari* by this Court. Because there are no questions important enough to warrant review and because the decision below clearly comports with existing law, the Petition should be denied.

Mr. Brown incorrectly reads this Court's decision in *Liljeberg v. Health Services Acquisition Corporation*, —— U.S. ——, 108 S.Ct. 2194 (1988), as obviating any factual basis for a judicial disqualification motion. Certainly the Court did not hold in *Liljeberg* that disqualification was appropriate whenever a *party* felt there might be an "appearance of impropriety"—particularly when the "facts" supporting the allegation of impropriety are determined by the judge to be a "total fiction." Mr.

Brown's interpretation of *Liljeberg* would require disqualification of judges and vacation of orders regardless of the truth of the allegations of conflict of interest.

Even if Mr. Brown had alleged factual circumstances sufficient to raise an "appearance of impropriety" regarding Chief Judge Wald's participation, *Liljeberg* does not mandate vacating the summary affirmance order. Rather, as the Court stated in *Liljeberg*, the remedy for a violation of 28 U.S.C. § 455 must take into account the status of the case and whether parties have come to rely upon the Court's order. —— U.S. at ——, 108 S.Ct. at 2204. The Court of Appeals was not required to vacate a decision even if Mr. Brown had raised a genuine violation of 28 U.S.C. § 455.

Moreover, the challenged order was entered by a unanimous three-judge panel. Even if Chief Judge Wald should not have sat on the case, her retroactive recusal would not affect the integrity of the order. *See, e.g., Hodosh v. Block Drug Co., Inc.*, 790 F.2d 880, 881-82 (Fed. Cir.), *cert. denied*, 479 U.S. 827 (1986) (referring to "erroneous assumption that a unanimous decision must be vacated when one member of a panel learns of a basis for his disqualification after the decision has been handed down."); *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (if recusal had been appropriate, and it was not, two remaining Circuit Judges were at liberty to decide appeal and would approve the opinion as issued).

Finally, the Court of Appeals' referral of Mr. Brown's counsel to disciplinary authorities was an appropriate exercise of the Court's inherent authority over members of its Bar. The Court properly took notice of Mr. Brown's repeated use of judicial disqualification and recusal motions. Indeed, the Browns' tactical use of these motions is without parallel: Since January 1986, in the litigation matters between the Browns and Associates, the Browns have filed three motions to recuse Bankruptcy Judge Bostetter, seven motions to recuse District Court

Judge Pratt, as well as recusal requests or motions directed at District Court Judges Johnson, Oberdorfer, and Green. The Browns also moved to disqualify Circuit Judge Ruth Bader Ginsburg in a related matter, also pending before this Court. *Brown v. 1250 Twenty-Fourth Street Associates Limited Partnership*, No. 89-392, petition for *certiorari* filed September 7, 1989. All of these efforts to recuse or disqualify judges have been denied. The Court of Appeals was fully justified in determining that the filing of the motion directed at Chief Judge Wald was not only factually insufficient, but was also part of a tactical use of recusals warranting inquiry by disciplinary authorities.

CONCLUSION

Petitioner has failed to establish any grounds for the granting of a writ of *certiorari*. The Court of Appeals' orders were in accord with the *Liljeberg* decision and were well within the Court's discretionary control over its own docket and its own Bar. Mr. Brown's attempt to concoct a "conflict of interest" was determined to be factually inaccurate and legally insufficient. Respondents respectfully request that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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October 11, 1989

APPENDIX

APPENDIX

***Order* and *Statement of Chief Judge Wald*, filed April 5, 1989**
(U.S. Court of Appeals No. 88-7020)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7020

1250 TWENTY-FOURTH STREET ASSOCIATES,
LIMITED PARTNERSHIP, *et al.*

v.

PHILIP J. BROWN, *et al.*,
Appellants

Before: Wald, Chief Judge*; Mikva and Edwards, Circuit Judges

ORDER

Upon consideration of appellants' motion to recall mandate, motion for leave to file motion in excess of twenty pages, the motion to vacate order and the oppositions thereto, it is

ORDERED that the motions be denied. Almost eight months after this appeal has been decided, appellants attempt to reopen their case by raising a totally frivolous allegation of "appearance of impropriety" on the part

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* A statement by Chief Judge Wald is attached. Chief Judge Wald did not participate in the decision to refer this matter to the appropriate authorities.

of a member of the panel. Appellants' argument concerning the alleged conflict of interest is irresponsible. In view of the abusive nature of these filings and in view of appellants' frequent use of this tactic, further inquiry is appropriate. It is, therefore,

FURTHER ORDERED that the conduct of Charles A. Kubinski, appellants' counsel, in this matter be referred to the Court's Committee on Admissions and Grievances and to the Office of Bar Counsel for the District of Columbia.

The Clerk is directed to mail a copy of this order both to appellants and to Charles A. Kubinski, 2613 P Street, N.W., Washington, D.C. 20007.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
DEPUTY CLERK

Statement of Chief Judge Wald

Motions have been filed by appellants to recall the mandate and vacate the order of June 28, 1988 in this matter on grounds that my husband was involved in a business transaction with the counsel for appellants' bankruptcy trustee, thus creating a conflict of interest or appearance of impropriety on my part.

It is alleged that my husband in December 1985 purchased for $20,000 a limited interest in a real estate partnership that appreciated to a value between $50,000 and $100,000 by April 1986, that the purchase was made from John Naisbitt, an earlier investor in the limited partnership through his attorney Peter Kolker, that Peter Kolker was also attorney to appellants' trustee in bankruptcy, that my husband's purchase of this limited partnership interest through Mr. Kolker was known to me, and that this circumstance created a conflict of interest or appearance of impropriety at the time I participated in the panel decision in this case requiring my recusal then and vacation of the panel order now.

The motions and voluminous supporting papers are replete with untruths, misrepresentations, inaccuracies, and irrelevancies. I address myself only to the central allegations of the motions.

My husband has never had business dealings with Mr. Kolker or Mr. Naisbitt directly or indirectly, did not directly or indirectly purchase Mr. Naisbitt's interest in a real estate limited partnership, or any part of it through Mr. Kolker, and did not then know, and did not learn until the filing of these motions, of any involvement or participation by Mr. Naisbitt or Mr. Kolker in the real estate partnership.

The purchase of an interest in the real estate partnership on December 31, 1985 was made by my husband in response to a private placement offering by OP Building Limited Partnership, owner of the Olympic Plaza office

complex in Los Angeles. A general partner in OP Building Limited Partnership was Anne Pallie, President of Anne Pallie Ltd., a real estate developer. Ms. Pallie had been a subtenant of my husband's law firm Wald, Harkrader & Ross at 1300—19th Street N.W., Washington, D.C. and a client of my husband's firm at the time OP Building Limited Partnership was formed in June 1985 but at the time of my husband's investment was neither a sub-tenant nor client of his firm.

In October 1985, in an unrelated transaction, Mr. John Naisbitt, through his attorney Peter Kolker, had agreed to purchase an interest in OP Building Limited Partnership. Mr. Naisbitt subsequently withdrew from the partnership on December 18, 1985. Mr. Naisbitt's and Mr. Kolker's prior participation in the partnership was unknown to my husband. Indeed, Mr. Naisbitt was unknown to my husband, as was Mr. Kolker's representation of Mr. Naisbitt.

My husband's dealings were exclusively with the offeror, OP Building Limited Partnership. He neither directly nor indirectly dealt with Mr. Naisbitt or Mr. Kolker. He did not purchase Mr. Naisbitt's interest or any part of it. He has never known Mr. Naisbitt and first learned of his existence through the pleadings filed on these motions March 24, 1989. He knows Mr. Kolker as a fellow member of the District of Columbia Bar.

I could not have known of a sale through Mr. Kolker of his client's interest in the partnership to my husband, nor of a purchase through Mr. Kolker by my husband of Mr. Kolker's client's interest, since no such sale or purchase ever occurred. They are a total fiction.

While it is not directly relevant to the motions, I wish to respond to the charge by appellants that in failing to include in my 1985 Financial Disclosure Report my husband's purchase in December 1985 of a limited interest in the OP Building Limited Partnership, I violated the

Ethics in Government Act. I am advised by my husband's accountant who assisted in the preparation of the report that on December 31, 1985, based on all available information, my husband's interest had a negative net worth, and thus was not an asset subject to reporting under the Financial Disclosure Instructions for Federal Officials and Employees then in effect. In April 1986, pursuant to a subsequent private placement offering, my husband purchased an additional interest in the partnership (renamed OP West/LA Associates) for cash and note in the amount of $63,000. This made his total investment $83,000 which I reported as having a value between $50,000 and $100,000 in my 1986 and subsequent Financial Disclosure Reports.

***Order*, filed June 9, 1989**
(U.S. Court of Appeals No. 88-7020 (*en banc*)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7020

1250 TWENTY-FOURTH STREET ASSOCIATES

LIMITED PARTNERSHIP, *et al.*

v.

PHILIP J. BROWN, *et al.*,
Appellants

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that appellants' suggestion is denied, and, upon further consideration of the suggestion and of the order of April 5, 1989, it is

FURTHER ORDERED, By the Court *en banc*, on its own motion, that the Clerk is directed to refer the aforesaid suggestion to the Court's Committee on Admissions and Grievances (Committee) and to the Bar Counsel for

the District of Columbia, to be considered in the proceedings initiated by the order of April 5, 1989.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald did not participate in the decision to refer the suggestion to the Committee and Bar Counsel.

Circuit Judges Ruth B. Ginsburg and D. H. Ginsburg did not participate in this matter.